

Case review article

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CROSSING AND NOT CROSSING: GENDER, SEXUALITY AND
MELANCHOLY IN THE EUROPEAN COURT OF HUMAN RIGHTS

Christine Goodwin v. United Kingdom (Application no. 28957/95) [2002]
I.R.L.R. 664, [2002] 2 F.L.R. 487, [2002] 2 F.C.R. 577, (2002) 35
E.H.R.R. 18, 13 B.H.R.C. 120, (2002) 67 B.M.L.R. 199, *I v. United Kingdom* (Application no. 25680/94) [2002] 2 F.L.R. 518, [2002] 2 F.C.R. 613 (ECHR)

ABSTRACT. In the cases of *Goodwin v. U.K.* and *I. v. U.K.* the European Court of Human Rights held the U.K. Government to be in breach of Articles 8 and 12 of the European Convention for denying certain rights and entitlements, particularly the right to marry, to post-operative transsexuals. This article argues that although on some level these are welcome decisions, they are also conservative and recuperative in that they seek to shore up traditional binarist ideas of gender and sexuality. The article concludes, however, that the Court's conservatism is problematic in a number of ways; and that it may be most profitable to read these cases as an invitation to imagine further and more profound challenges to the old order.

KEY WORDS: co-option, law reform, transgender, transgression, transsexual rights

INTRODUCTION

At last! After numerous failed attempts¹ to dislodge the disreputable and distasteful, crudely biologically essentialist, logic of Ormrod J. in *Corbett v. Corbett*,² which has been a blight on the freedom transsexual people in Britain for three decades, the European Court of Human Rights finally ran out of patience with the British Government and its courts. In the cases of *Christine Goodwin v. The United Kingdom* (Application no.28957/95)

¹ *Rees v. UK* [1987] 9 E.H.R.R. 562, F.L.R. 111; *Cossey v. UK* [1991] ECHR Reports Series A no. 184, [1991] 2 F.L.R. 492; [1993] 2 F.C.R. 97; (1991) 13 E.H.R.R. 622; *Sheffield and Horsham v. UK* [1998] 2 F.L.R. 928, [1998] 3 F.C.R. 141, (1999) 27 E.H.R.R. 163.

² In *Corbett v. Corbett (orse. Ashley)* [1971] P. 83; [1970] 2 W.L.R. 1306; [1970] 2 All E.R. 33. The court held that sex for legal purposes is determined by the congruence of genitals, gonads and chromosomes, and that the relevant time for making that determination is birth. For detailed analysis of this case, see Sharpe (2002a).



and *I. v. The United Kingdom* (Application no. 25680/94), the Court held that in a number of ways, most notably perhaps with regard to the denial of the right of a post-operative transsexual to marry in his or her post-operative gender identity, U.K. law is in breach of Articles 8 and 12 of the European Convention.³ It consequently made otiose the opinion of the House of Lords on these issues in the impending appeal against the Court of Appeal's decision in *Bellinger*,⁴ the most recent instance in which the Court of Appeal declined to depart from the *Corbett* approach. So, it's all done bar the shouting. Section 11(c) of the Matrimonial Causes Act 1973⁵ will henceforth have to be read in terms of current gender identity rather than biological sex at birth. The U.K. Government will also have to make the necessary changes in other areas, such as pensions and national insurance, and the system of registration of births; and generally complete a process of assimilation of post-operative transsexuals into the normative assumptions of government policy, which it had begun, but then abandoned, after the last ruling from the European Court.⁶ Transsexual people have won equal rights! Sharpe's recent statement in this journal, that "the spectre of *Corbett* ... is likely to continue to haunt English transgender jurisprudence in the foreseeable future" (Sharpe, 2002a, p. 87) seems at first glance to have been overly gloomy. *Corbett* has been overruled, hasn't it?

If only things were that simple. On closer inspection, it becomes apparent that this is by no means the end of the story. It is not even a singular beginning. Is this a moment of transgression and liberation, or one of reactionary conservatism? I will argue for the obvious position: it is both at once. *Goodwin* and *I.* at once mark the attainment of a plateau, a concrete and to some extent irreducible move forward, an affirmation or endorsement, for transsexual people, for sexual minorities, and for gender and minoritarian politics in general; and yet also a hardening of the binarism of gender, the co-option of radicality, and the denial or suppression of differ-

³ Article 8(1): "everyone has the right to respect for his private and family life". Article 8(2): "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Article 12: "men and women of marriageable age shall have the right to marry and found a family, according to the national laws governing the exercise of this right".

⁴ *Bellinger v. Bellinger* [2002] Fam. 150. The appeal is scheduled to be heard in late January 2003.

⁵ Which provides that a marriage that does not involve one male and one female is void.

⁶ In *Sheffield and Horsham, supra*, n. 1.

ence. In this paper I attempt a reading of *Goodwin* and *I.* which highlights both the possibilities and the dangers that inhere in the judgements of the Court.

The cases as constructed by the Court were essentially as follows. Christine Goodwin and I. had both been classified as male at birth on the basis of external genitalia. Both had in adult life received gender reassignment surgery, thereafter living permanently as females. Both claimed that following gender reassignment they had been discriminated against in various fields – in marriage and employment, and to benefits and pensions entitlements – in ways which rendered the Government of the U.K. in breach of the Convention. Breaches of Articles 8, 12 and 14 were pleaded in both cases, and the European Court undertook a wide-ranging examination of the state of the law relating to transsexualism in England and Wales. The Court heard that the U.K. Government accommodates the changed identity of post-operative transsexuals in a variety of ways. For instance, as has been the case even before the ruling in *Rees*,⁷ documents such as passports and driving licences are issued in the post-operative identity of the individual concerned. The Court also heard evidence of developments that had taken place in the area of employment law as a result of the ruling of the European Court of Justice in *P. v. S. and Cornwall County Council*.⁸

However, it also observed that post-operative transsexual people suffer discrimination and disadvantage with respect to entitlement to marry (G., para. 101⁹); for the purposes of pension and social security benefits, and in employment because of the refusal of the U.K. Government to issue post-operative transsexuals with a national insurance number in the relevant new gender identity (para. 76); and in relation to the problems consequent on the possibility of using a birth certificate in order to obtain, *inter alia*, employment or a student loan (I., para. 56). It also heard that the Government had, after the ruling in *Sheffield and Horsham*, established an Interdepartmental Working Group on Transsexual People, which had reported on the current legal situation and options for change in April 2000

⁷ *Supra*, n. 1.

⁸ [1996] I.R.L.R. 347. The specific response of the U.K. Government in the context of employment was first, to issue a Consultation Paper (see Department for Education and Employment, 1998), and then introduce the Sex Discrimination (Gender Reassignment) Regulations 1999 (S.I. 1999/1102), which prohibit discrimination in the work place. Interestingly, and significantly, these regulations apply to all transsexual people, whether post-operative or pre-operative. For commentary see Slater (2002) and Department for Education and Employment (1999).

⁹ As the judgements are in most regards identical, reference will be made only to the report of *Goodwin* (G.) except where the point in question is only to be found in the judgment in *I.* (I.) or where it is necessary to refer to both judgements.

(Home Office, 2000, hereafter cited as “I.W.G.”), but that it had no plans to act on the findings of that Report further to advance the legal recognition of transsexuals, and that the English Court of Appeal had declined to act in default (para. 52).

READING ONE: HOPE

The Court readily accepted that a post-operative transsexual suffers a *prima facie* breach of his/her human rights in the ways mentioned above. In doing so it took a no-nonsense approach to the various strands of the opening argument of the U.K. Government; that there was no substantive discrimination in English law. The U.K. Government argued *inter alia* that as there are special arrangements to ensure that information about gender reassignment is not divulged to employers in the context of national insurance, and to allow a post-operative male to female transsexual to retire at the female retirement age of sixty (albeit that such individuals have to make good the shortfall in national insurance contributions that results from their ‘early’ retirement), there was in fact no discrimination against post-operative transsexuals. The Court rejected such arguments for the obvious reason that the very fact that there are special arrangements “might in itself call attention to her status” (para. 76), as had in fact happened to Christine Goodwin. In similar vein, the Court held the argument that a transsexual is not barred from marrying, as he or she may marry a person of the opposite birth-sex to be “artificial” (para. 101). The Court’s approach – of ensuring that the Convention provides rights which are “practical and effective, not theoretical and illusory” (para. 74) – institutes an act of crossing. The post-operative transsexual crosses the divide, from the site of the Different/Other/deviant, to the site of the Same/Self/normal; and as such the judgement in these cases can be read as an expansion of the Self, of gender as norm and as category.

Having made it clear that it would not countenance arguments based on lack of tangible discrimination, the Court then moved to consider the “public interest” justifications that the U.K. Government was able to muster (para. 80). These concerned the practical consequences for various government systems if required to accommodate post-operative transsexuals’ requests for recognition that their sex has changed. The U.K. Government also argued that U.K. law’s reliance on biological criteria for determining sex was not contradicted by the present state of scientific knowledge regarding transsexualism. Finally, the Court looked at the question of whether the U.K. Government’s position, a minority position

within Europe, fell within the margin of appreciation allowed under the Convention.

On the Article 8 question, the Court decided that the scientific knowledge was inconclusive (para. 81) and therefore incapable of proving determinative of the legal situation (para. 82). Although Europe was no closer to a consensus on this question than it had been at the time of *Sheffield and Horsham*, the Court placed much greater importance on “the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals” (para. 85). Against this backdrop, the Court clearly felt the time for change, and for imposing a positive obligation on the U.K. Government, had come:

A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement. In the present context the Court has, on several occasions since 1986,¹⁰ signalled its consciousness of the serious problems facing transsexuals . . . The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience . . . No concrete or substantial hardship or detriment to the public interest has been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost . . . the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant (paras. 74, 77, 91, 93).¹¹

The Court’s conclusion on Article 8 determined its approach to Article 12. That is, as it had determined for Article 8 purposes that a post-operative transsexual is to be treated as a *bona fide* member of his or her acquired gender, such a person, denied the right to marry a person of the newly opposite sex “may therefore claim that the very essence of her right to marry has been infringed” (para. 101). As such, the blanket ban in the U.K. was found to be in breach of Article 12 (para. 104).

¹⁰ The date of the decision in *Rees*.

¹¹ It was clear from *Sheffield and Horsham* (*supra*, n. 1), that the court might take this approach sooner rather than later: “Even if there have been no significant scientific developments since the date of the *Cossey* judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the court reiterates that this area needs to be kept under review by contracting states” (*supra*, n. 1, para. 60).

In finding breaches of Articles 8 and 12,¹² the Court shows genuine radicalism. In contradistinction to the jurisprudence in England and Wales, which, since *Corbett*,¹³ has cloaked the moral choices and discursive moves of the judges with the purported neutrality of scientific discourse, even when positing a move away from the *Corbett* approach in some way,¹⁴ for the European Court the scientific evidence was of “diminished relevance” (para. 85). It is true that in its earlier case law the Court, in finding no breach of the Convention in the substance of English and Welsh law, did not endorse the quasi-scientific approach of the U.K. government and courts, but instead held that the approach taken in the U.K. was within the margin of discretion allowed by the Convention in matters where there is no common European approach. But in *Goodwin* and *I.* the Court has now unanimously affirmed the relevance of social and psychological criteria. The significance of chromosomes, those invisible but allegedly vital markers of sexed identity, was called into question.¹⁵ The relevance of this is that although genitalia and gonads can be altered by surgery, chromosomal make-up is unalterable. Here, then, the Court abandons static for dynamic criteria, sex for gender, biology for sociology or psychology. In so doing, it recognises the socially constructed nature of sex categories, and that there is the possibility of movement between the categories. It also recognises that gender identity is to some extent a matter of choice and self-ascription. This decision opens the door to a legal micro-politics of the self.¹⁶ The Court comes close to saying that the biological

¹² The Court made no finding under Article 14, considering that the issues had all been dealt with under Articles 8 and 12 (G., para. 108). Goodwin also argued a breach of Article 13 (right to an effective remedy) but this was dismissed on the basis that after the Human Rights Act 1998 the same remedy was available to an applicant in a U.K. national court. The Court also declined to make any award under Article 41 (just satisfaction) in either case, finding on the facts that the new legal recognition of their status was satisfaction enough for both applicants (G., para. 105, I., para. 85).

¹³ *Supra*, n. 2.

¹⁴ See Sharpe (2002a, at pp. 71–80), discussing the judgement of Ward L.J., in *S.T. (formerly J.) v. J.* [1998] 1 All E.R. 431.

¹⁵ See *Goodwin*, para. 82: “It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.”

¹⁶ The concept of a ‘micro-politics of the self’ is perhaps most closely associated with Michel Foucault. The phrase invokes the idea of the self as “an ascetic practice . . . not in the sense of a morality of renunciation but as an exercise of the self on the self, by which one attempts to develop and transform oneself . . .” (Foucault, 1996, p. 433; see also Foucault, 1988). Historically, law has not accepted such ideas: the self (in gendered or sexual terms) has been imposed by law. My suggestion here is that these cases can as such be seen as implementing a sort of ‘devolution’ of power in legal terms from the law to the self.

criteria are themselves socially constructed, or that scientific knowledge is an ideological or discursive artifact. This is a potentially momentous shift.

There is also hope in what the Court does not say. In particular, the positing of gender merely in terms of (presumptively neutral and non-hierarchical) 'opposites' elides the fact that the dynamics of the journey from one to the other are very different, depending on the direction of travel. The woman-becoming-man makes a claim to enter the privileged category of the masculine, and can be read as performative of a certain version of feminist politics – that which seeks equality, which entails the female crossing to occupy the site formerly reserved for the male. This claim is, strictly, unthinkable within the patriarchal logos, because it carries with it the threat of the appropriation of the phallus. As such, *Goodwin and I.*, by being prepared to accept that an artificially constructed penis is for legal purposes as good as the 'real thing', in some sense denaturalise and undermine the masculine. O'Donovan's point, that "The behaviour of transsexuals, as boundary crossers, illuminates what it means to 'pass' as a woman or a man. The significance and the rootedness of our notions of femininity or masculinity becomes apparent, as does the degree to which we pass as woman or man on a daily basis" (O'Donovan, 1993, p. 83), remains absolutely pertinent. These cases show us that that which is posited as the very essence of masculinity, its emblem and its icon, turns out rather to be capable of being created as modification, a mere addendum.

In terms of the logic of patriarchy, the man-becoming-woman is performative of a different kind of undermining, namely self-mutilation or castration. In strong versions of theories of gender difference, such as that of Lacan (see Lacan 1977; Mitchell and Rose 1982), the phallus is figured as the 'signifier of signifiers', the absolute bar or limit that continually prevents access to any world before or beyond binary gender categories, ground zero for the psychic construction of reality. From this point of view, the man-becoming-woman is not so much unthinkable, but rather offers her/his body as a performance of the most radical challenge to patriarchal logic that is (in)conceivable. It is an act akin to suicide or annihilation. The man-becoming-woman does not so much 'cross' as cease to exist, for how else should the desire to relinquish one's privileged status, as male, in order to occupy the site of absence, the woman-who-is-not-one (Irigaray, 1985), be understood?

And yet, and here is the point, the Court in these judgements does offer a different way to understand the performativity of crossing; and one which, in its (potential) denial of the transcendental nature of the phallus

– the novelty of its ruling that the human rights or legal subjectivity of the crosser do not cease to exist after crossing¹⁷ – may just hold the promise of a new taxonomy of gender derived somewhere beyond the patriarchal logos. Maybe even, if I may be allowed a brief utopian moment, the promise of a new taxonomy of subjectivity derived from somewhere beyond the normative strictures and categorical imperatives that ‘gender’ endlessly rehearses. The Court decides these cases on the basis that the interests of some 2,000–5,000 transsexuals in the U.K. are at stake (para. 87),¹⁸ but that conclusion follows from a parochial survey of the gendered interests at play. For a start, it will be difficult for other Contracting Parties to the Convention to avoid the application of these cases within their own jurisdictions.¹⁹ But over and above that, these decisions have a general relevance for any feminist or other critical politics of gender. They present a challenge to tell new stories, to develop arguments designed to exploit further the fissure in the boundaries of hegemonic, privileged and naturalised masculinity that the Court, seemingly inadvertently (?), has opened up. To cross is to reveal the permeability of the borders of dominant constructions of gender categories, as it is also to reveal the fallacy of the Lacanian position, or bar that is not one.²⁰

Moreover, the logic of the Court’s approach, and the language that it chooses to use, seem to indicate that the extension of “equal rights” to *sexual* minorities may follow. The view that there is a general human right of all people to “live in dignity and worth in accordance with the sexual identity chosen by them” (which is our first clue that these judgments are structured through a slippage between gender and sexuality) is not limited by the Court to any specific sexual group. The Court also distanced itself from its earlier view, that the right to marriage that it is charged to protect refers to “traditional marriage between persons of the opposite sex”, that is marriage “as the basis of the family”.²¹ Now, its view is that “the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right [to marry]” (para. 98). The Court only goes as far as is

¹⁷ Which, of course, is *precisely* the view that underpins the Court’s earlier rulings.

¹⁸ The Court takes that figure from the I.W.G. Report, p. 26.

¹⁹ The Court does not decide that transsexuals in all jurisdictions should have the same degree of human rights protection as it holds is required in the U.K. It may be (although personally I am doubtful) that the public interest justifications applicable in other jurisdictions are still capable of allowing States to withhold legal recognition from transsexuals.

²⁰ I have argued elsewhere that insofar as Lacan posits the phallus as an absolute bar which permits no beyond, then he is mistaken (see Sandland, 1998, pp. 312–317 and 322–325).

²¹ *Rees, supra*, n. 1., para 49.

necessary to decide the cases before it, and does not explicitly question the proposition that marriage is the union of one woman and one man. But it is worth pointing out that the Court cites, although without comment, Article 9 of the Charter of Fundamental Rights of the European Union (solemnly proclaimed at the meeting of the European Council in Nice in December 2000, but not yet legally binding), which differs markedly from Article 12 of the Convention. Article 9 provides that “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. That is, here the right to marry is not limited by the reference to “men and women of marriageable age” as is Article 12, and the reference to the separate right to found a family, and to “these rights” rather than Article 12’s “this right”, disaggregates the right to marry from the right to found a family. In the Charter these are two discrete rights; and the Court reads the Convention as though its wording is that of the Charter, and that is a hopeful development for *all* those who wish to see law accommodate arrangements other than the heterosexual norm (see further Cooper et al., 2001).

In fact, and interestingly in terms of law reform strategy, the Court seems almost to endorse a chaos theory version of jurisprudence, where developments and ‘trends’ bounce around the globe in unpredictable ways. It was certainly open to the Court to have decided these cases in favour of the position of the U.K. Government.²² There has been no further development of a common European approach since the last time these issues were before it,²³ and hence there was no call for any movement in the drawing of the margin of appreciation afforded to national governments on this question. But the Court instead accepted as relevant evidence of developments outside Europe. Legal changes elsewhere have rippled around the world such that a retired person in England can enjoy all the entitlements consequent upon pensioner status in her chosen gender identity.²⁴ These cases affirm both the global nature of gender politics in the twenty-first century, and that there is reason to hope for further positive developments.

²² See Morawa (2002, p. 1), describing the approach of the Court in these cases as “an explicit deviation from previous constant jurisprudence”.

²³ The British civil rights group, Liberty, as third party intervener, had placed information before the court about the situation regarding transsexuals in Europe. This showed that there “had not been a statistical increase in states giving full recognition of gender reassignment within Europe” (para. 56) since the court’s decision in *Sheffield and Horsham* (*supra*, n. 1).

²⁴ Jurisdictions which had abandoned *Corbett* between *Sheffield and Horsham* and *Goodwin and I.* comprised Singapore, Canada, South Africa, Israel, Australia, New Zealand and all but two of the United States of America (para. 55).

READING TWO: DANGER

It is difficult to disagree with Whittle's play on words (see Whittle, 2002, p. 153): this is a 'good win'. These decisions will make a marked difference to the quality of life of post-operative transsexuals. Already *Goodwin* has been applied by a national court in an employment context.²⁵ But some significant reservations are also in order. First, going against the spirit of empowerment and self-definition that the Court seemed to endorse, these judgements simultaneously affirmed that "it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes the gender re-assignment has been properly effected" (para. 103). This leaves room for States to draw criteria tightly, which given the limitations of gender reassignment surgery,²⁶ will cause problems for some individuals. As a result of these judgements we are entering a new age in the perusal of genitalia, in which each examination will adjudicate on whether the construction is sufficiently 'real' as to allow the State to confirm formally that crossing from one gender category to the other has occurred. So much for the view that these judgments escape biological essentialism.²⁷

²⁵ See *Chief Constable of West Yorkshire v. A. (No. 2)* [2002] E.W.C.A. Civ 1584, 2002 W.L. 31442575, C.A. The court held that the *Goodwin* decision was applicable in the case of a male to female transsexual who had been denied employment by the appellant police force. The court did also hold, however, that a decision not to employ a transsexual who did not consent to the disclosure of his or her transsexuality to other officers on a need to know basis might be justifiable on public interest grounds (i.e. that such an individual might compromise efficient policing, e.g. by refusing (for no apparent reason) to search a member of the 'same' sex).

²⁶ Particularly phalloplasty.

²⁷ Initially, the D.f.E.E. suggested (1998, para. 14) that the test to be applied might be whether the body of the transsexual would, when observed by a reasonable person, be taken to be the body of a member of that individual's new sexual identity. Following the decisions in these cases, new proposals were mooted (Lord Chancellor's Department, 2002), under which legal recognition in one's new gender identity would be ruled upon by a "regulatory authority", of "medical and legal experts", and would depend on supporting medical evidence (a diagnosis of gender dysphoria) and proof that the individual in question has lived "successfully" (whatever that means) in his or her new gender identity for at least two years. Significantly, it would not be necessary for an individual to undergo gender reassignment surgery in order to be judged to have crossed from one sex to the other, and to the extent that this proposal departs from the approach taken in the European Court, it is to be welcomed. It must be said, however, that these most recent proposals raise as many questions as they answer, although space precludes a fuller analysis here. A Parliamentary Bill is promised (Lord Chancellor's Department, 2002, para. 14).

Secondly, if it is assumed (for now) that one does need to 'belong'²⁸ to one of the two designated gender categories for the purposes of legal marriage, nevertheless it is not clear why this should also be the case as far as the Article 8 issues are concerned. The right to privacy, for example as it operates in employment or education, is not a right the exercise of which depends on proof of gender identity, but only of identity as a human being. Why should the sufficiency of crossing be *at all* relevant here? Already we can see that, in some respects, the Court did trade in 'illusory' rather than 'practical' rights. The State is also left to determine other residual issues, including the mechanism by which lawful marriages entered into before gender is reassigned are to be voided²⁹ and the formalities which need to be satisfied if any post-operative marriage is to be valid, including the information that must be provided to any intended spouse. It is also worth pointing out that the Court does not construct the right of post-operative transsexuals to full legal recognition in any fundamental sense. The rights of the transsexual minority are given at the grace of the heterosexual majority, and so are reliant on the continuation of the 'trend' towards liberalisation. This seems to suggest that if the 'trend' starts to reverse, the rights given in these cases could be taken away.

This may be unduly pessimistic. But it gives insight into the fact that *Goodwin* and *I.* can be understood in terms of a strategic repositioning; an apparent concession, but one in fact dictated by the desire of the court to reinstate and affirm the proper. Clearly, the judgements trade in normative images – the proper woman, the proper man. A proper woman, for example, only wants to marry a man, and the Court makes a point of telling us that both Ms. Goodwin and I. "live as a woman, is in a relationship with a man and would only wish to marry a man" (G., para. 101, I, para. 81). In this sense, there is no crossing here, only the expansion of the boundaries of the proper, a redefinition of the necessary and sufficient properties of 'woman' and 'man', and the departure from *Corbett* is hence mere chimera. The better reading of these cases is that they *deny* transsexualism, fail to see it, in its difference, in its ambiguity. The Court looks at the Other but only sees the Same. Biology is not the only measure of binarism, and in *Goodwin* and *I.* social and psychosocial factors are put to work in order to reaffirm what, at least on one reading of *Corbett* was

²⁸ Of course, as far as the law is concerned, every individual belongs to one sex or the other, but belonging which is discordant with self-perception is, as the Court recognises, a poor sort of belonging.

²⁹ Space precludes discussion of the significant issues at stake here. Can the State require that a marriage hitherto valid must be treated as void if one of the spouses undertakes gender reassignment surgery? Would any such requirement survive challenge under Article 8? See further Whittle, 2002, p. 158.

the essential aspect of that case, which was only incidentally to do with biology and everything to do with the view that the world comprises two fundamental gender categories. ‘Transsexualism’ is not defined in either of these cases but the Court had earlier, in *Rees*, explained that:

The term ‘transsexual’ is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.³⁰

If the campaign for transsexual rights distills down into the claim to be treated as a proper member of one’s new gender identity category, then it is, inescapably, a conservative political act.

But of course, the concept of transsexualism used by the courts in these cases is not uncontested. As Sharpe has recently discussed (2002b, pp. 1–2), transsexualism is increasingly subsumed under the broader idea of ‘transgender’, an umbrella term which encompasses a range of both transgressive and transcendent gender identities, the latter meaning those which do not construct ambiguity as problematic. This range of possibilities, of ways of being, is acknowledged by the Court, which cites (para. 50) the following passage from the Report of the I.W.G.:

Transsexual people deal with their condition in different ways. Some live in the opposite sex without any treatment to acquire its physical attributes. Others take hormones so as to obtain some of the secondary characteristics of their chosen sex. A smaller number will undergo surgical procedures to make their bodies resemble, so far as possible, those of their acquired gender. The extent of treatment may be determined by individual choice, or by factors such as health or financial resources. Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives (Home Office, 2000, para. 5.1).

But the Court suppresses this diversity. If by ‘the spectre of *Corbett*’ we understand a horror of ambiguous gender identity, resolved through a strategy that determines to render that ambiguity as other and unthinkable, then it is not escaped by these judgements. On the contrary, the horror of that ambiguity is placed at the heart of the Court’s reasoning: “In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable” (para. 90). The Court will not stand for the logic of the ‘third’ way.

This much is evident from the significance the Court places on the medicalisation of transsexuality. The Court opens its narrative in *Goodwin* with the information that Ms. Goodwin was *diagnosed* as a transsexual

³⁰ *Supra*, n. 1, at 120.

(para. 13), thus immediately deferring to a medicalised construction of transsexualism. We are told about the hospitals that she visited and the treatments that were provided for her. Before being accepted for gender reassignment surgery she had attended “regular consultations with a psychiatrist as well as on occasion a psychologist” (para. 13). The Court placed much emphasis, in finding breaches of the Convention, on the fact that gender reassignment surgery in the U.K. “in common with vast majority of Contracting States” is carried out by the national health service (para. 81), and had been performed by the N.H.S. in these particular cases. The Court also pointed out that as the facts of *X., Y. and Z. v. U.K.*³¹ show, the U.K. Government then further permits the artificial insemination of a woman living with a female-to-male transsexual. In such circumstances, “it appears illogical to refuse to recognise the legal implications of the result to which the [gender reassignment] treatment leads” (para. 78).

Thus the legal recognition of the rights of post-operative transsexuals follows the medical recognition of transsexualism as an illness. A cynic might therefore read the bestowing of rights on post-operative transsexuals as evidence of the respect of lawyers for doctors rather than for transsexuals. More importantly, perhaps, transsexualism is not merely an illness but a mental disorder, not an alternative to the norm but an aberration of it. Indeed, the Court tells us that the medically approved term is now “gender identity disorder” in DSM-IV and ICD-10, the latest internationally used diagnostic manuals of mental disorders. The resort to medical discourse performs two functions here. First, it renders the unintelligible intelligible *qua* unintelligible and hence engenders a radical cut between the two. It is a strategy of confirming the normality of the Self by naming the deviance of the Other. Second, it gives the Court criteria by which to delineate the Human, the holder of human rights. Human rights, it seems, belong to the sane and to the cured, the conformed. There is a circularity at play here, for conformity is also the requirement of access to gender reassignment surgery. Transsexuals are characterised medically as either “primary” or “secondary”, the latter being unlikely to be accepted for surgery on the grounds that such persons are not true transsexuals but rather have fetishised crossing.³² Sexual orientation is a key diagnostic and prognostic factor. The preferred candidate is usually a “homosexual

³¹ (1997) 24 E.H.R.R. 143. *Goodwin* gives reason to believe that further challenge to the decision in this case – that there is no breach of Article 8 in denying the legal status of ‘father’ to a post-operative female-to-male transsexual – may be worthwhile.

³² See *R. v. Ashworth Hospital Authority ex parte E.* 2001 W.L. 1479868 (2001) in which it was held no breach of Article 8 to deny the applicant the right to dress as a woman in public spaces within Ashworth hospital, largely on the grounds of his diagnosis as “a fetishistic transvestite”.

transsexual”, that is, attracted sexually to members of his or her birth sex, for whom the chances of successful reassignment are seen as better.³³ Although DSM-IV now uses the terms “sexually attracted to males” or “females” as the case may be, the underlying logic is unchanged. Where there is not “psychological conformity”, access to gender reassignment surgery may be denied.

It is worth examining precisely what is rendered Other here, for it is a broad constituency – all those ways of living which depart from the heterosexual norm. Hence, although there are arguments here of use to gay rights campaigners, these judgments are also properly read as homophobic. Indeed, from the perspective that the Court seems to adopt, the distinction between pre-operative transsexuality and homosexuality is very nearly one without a difference. The legal recognition of Christine Goodwin and I. in their acquired gender identities saves them not merely from the ambiguity of gender identity but also the ambiguity of sexual identity. Now, their imputed desire “to marry only a man” is rendered heterosexual and orthodox. It is rescued or recuperated from a potential discourse of homo-erotics, and homosexuality is accordingly rendered Other alongside ambiguous versions of transsexuality.

For post-operative transsexuals, this is in terms of legal rights a definite move forward. I have cited before (Sandland, 1995, p. 37, n. 110) Ormrod J.’s observation in *Corbett*, that intercourse with a post-operative male to female transsexual “is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-cural intercourse is, in my judgement, to be measured in centimetres.”³⁴ But it is worth citing again, because it is this way of thinking that has been departed from by the European Court. The distinction between vaginal and anal (read: heterosexual and homosexual) intercourse is *precisely* what the Court does now insist on. Somewhere on those centimetres of flesh law redraws a line, and post-operative transsexuals are now counted ‘in’. In this respect, these cases seem to confirm Sharpe’s (2002b) central argument, that the fundamental dynamic in the discourse around transsexualism is sexuality rather than gender, in essence a logic of heterosexuality, with the consequent practical and strategic problem, that gains for post-operative transsexuals are at the expense of further shoring up the construction of homosexuality as *the* fundamental deviation. *Goodwin* and *I.* can be read as the displacement of deviance, structured through a rhetorical frame that incorporates a

³³ In this respect, Christine Goodwin was an unlikely candidate for surgery as she had married as a man and had children.

³⁴ *Corbett, supra*, n. 2, at 107.

slippage between categories of gender and sexual identity, which measures gender in normative terms derived from sexuality. These cases voice the heterosexual desire of law for singularity, the singular truth, the total obfuscation of any discontinuity between gender identity and sexuality, for a repositioned certainty that is prepared to stand for some crossing, but no undermining. If this is the price of human rights for transsexuals, then it is not clear that it is a price worth paying.

A RECUPERATIVE ENDING: FROM DANGER SPRINGS HOPE?

The Court's approach is essentially recuperative. It recuperates the dominant constructions and dynamics of gender and sexuality from the potential challenge of transsexualism. I would like to conclude by sketching the outline of a different sort of recuperation, one of ambiguity and diversity. This begins with the observation that gender and sexuality are *relational* categories, and the oppositional models of gender and sexuality are not merely expressive of hierarchy but rather of a *dynamic*. The heterosexual repudiation of homosexuality, just like the patriarchal repudiation of femininity, is caught within a logic where repudiation is also affirmation. At the level of the psyche we can say that rejection of the Other is constitutive of (gendered/sexual) identity formation – the male is that which is not the female, the heterosexual is that which is not the homosexual (and vice-versa). As such, the assumption of a (gendered or sexual) identity entails a repudiation of potential objects of attachment, *but that very repudiation admits of the prior possibility of acceptance*. So it can be argued that the structure of normative heterosexuality, at the level of the ego, “contains within it both the prohibition and the desire, and so embodies the ungrieved loss of the homosexual cathexis . . . the lost object continues to haunt and inhabit the ego as one of its constitutive identifications and is, in that sense, made coextensive with the ego itself” (Butler, 1995, pp. 25, 23). When this process is generalised “then the ‘loss’ of homosexual love is precipitated through a prohibition, which is repeated and ritualized throughout the culture. What ensues is a melancholy in which masculinity and femininity emerge as the traces of an ungrieved and ungrievable loss” (*ibid.*, p. 28). To this extent, the norm, in its own terms, is pathological and paradoxical.

The Court is caught in this paradox, first because it stages the emergence of the newly gendered individual as legally validated, and secondly and more importantly because these judgements, of prohibition or disavowal, affirm the Court's proper (heterosexual) place in this normative/pathological order. Its attempted solution – to cut the Other

from itself, to assimilate the Self that inheres in the Other and deny the remainder – merely reveals the fundamentality of this contradiction within the dominant logic it deploys, which demands that the Other cannot be assimilated into the Self. It is a melancholy and prurient judgement that the Court delivers, a melancholy and prurient prohibition that it instigates; melancholic because it is unable ultimately to achieve its purpose, nor even to admit it; prurient because the Court continues to fix its gaze on the body of the Other, looking for signs to explain its deviance or the scars of attempts to bring it to conformity.

Caught in this contradiction, we should expect that Law's Empire will continue to feel its borders and its limits: transsexualism will continue, despite this legal judgment, to exceed the heterosexual. We will find that it cannot be given its proper place. At the same time, however, the danger is that it is likely, together with homosexuality, to circulate only as the sign for the ambiguous and the deviant, the excluded; and always in opposition to the norm. What is required, therefore, by a radical legal politics of gender and sexuality, is a way of thinking which begins outside this logos, but which is able also to occupy it. This is also presumptively a dangerous place, insofar as it must be a place outside Identity. This approaches recognises, for example, that there is a sense in which a campaign for 'gay rights' self-undermines by reconstituting the heterosexual/homosexual dyad. But it is also a presumptively hopeful place, for it is *only* somewhere outside Identity, and dyadic thought, that connection with the Other is truly a possibility. And here *Goodwin* and *I.* may hint at the future potential of human rights law, because these decisions demonstrate that human rights jurisprudence, historically a producer of Identity-as-Dyadic, is in fact occupiable space, that is, space without essence;³⁵ it is putatively normative space which can nevertheless be otherwise. It is the space reserved for those conforming to biological/ideological requirements (of masculinity and femininity, etc.) which can, and as a result of these decisions, has (in some sense), been occupied by the transsexual other. In other words, these cases reveal the normative claims of patriarchal heterosexuality – to merely reflect some essential apolitical truth of human existence – to be indeed political and, in their own terms, false. They remind us that these stories of gender and sex, of norm and deviation, that patriarchal heterosexuality peddles are only stories, and "there is no necessary reason for identification to oppose desire, or for desire to be fueled through repudiation" (Butler, 1995, p. 35). Can we see in these cases a glimpse of human rights law that speaks this other language, of human dignity without essence? Is there not the hint here of a different order of law, which understands that differ-

³⁵ I elaborate further on the importance of this point at Sandland (1998, pp. 308–311).

ence need not be sacrificed in the name of inclusivity? I am suggesting that, perhaps against their tenor, these judgements be read for what they concede to the Other, which (for now) is the malleability and permeability of binary categories. For me these cases are an invitation, to go further, to try and imagine a law that is opposed to the logic of the categorisation of sexuality and gender; a law which can articulate a place, a different sort of ground zero, where human connectedness need not be structured through that categorising imperative which demands a remainder or outside. It is worth remembering that sexual politics is not of the order of logic. It is true that the Court functions here within that discourse which constructs same-sex relations as unthinkable and monstrous, and ambiguous sexual identities as aberrant. But, just as the links between the earlier caselaw and these cases are political, rather than logical or (in any technical sense) legal, so too *Goodwin* and *I.* are unable to constrain that which is yet to come. Already in England we have seen the Court of Appeal prioritise connectedness over melancholy in a 'gay rights' case;³⁶ still a prurient act, but a different order of prurience.

"Prurient" means "1. Unusually or morbidly interested in sexual thoughts or practices. 2. Exciting or encouraging lustfulness; erotic" (Collins English Dictionary, 2000). The Strasbourg Court, truly melancholic at the loss of its homosexual or transsexual self, its self beyond Self, found itself unable to let go, without also letting go of itself. So the Court engages in prurience in its first sense. But in doing so it cannot help but also invoke the word in its second sense. It cannot help, that is, but encourage the fullness of our lust, encourage us to seek recognition of our lust, our sexuality and gendered identity, in all its diversity. It has donated a set of arguments, based on the right of all sexual beings to live as they chose in dignity (which may entail the placing of positive obligations on States), that allow transposition to other contexts, specifically from, between, and most importantly beyond, gendered and sexual identity. In the end, we must all learn to let go. If we do, we may find that we *can* escape from the spectre of *Corbett*. Perhaps it is only a case of reconfiguring 'spectre' so that it reads 'respect'.

³⁶ See *Mendoza v. Ghaidan* [2002] E.W.C.A. Civ 1533, 2002 W.L. 31442578. The Court of Appeal held that discrimination against homosexual partners under the Rent Act 1977, sched. 1, breached Articles 8 and 14 ECHR, refusing to follow the pre Human Rights Act decision of the House of Lords in *Fitzpatrick v. Sterling Housing Association* [2001] 1 A.C. 27; [1999] 4 All E.R. 705. See also Diduck (2001) and Sandland (2000).

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